

Employment and Training Administration, Labor

§ 655.101

usually of short duration. Generally, employment, which is contemplated to continue indefinitely, is not temporary.

* * * * *

“On a seasonal or other temporary basis” does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

* * * * *

“On a seasonal or other temporary basis” does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) “*Temporary*”. For the purposes of this subpart, the definition of “temporary” in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to § 655.106(c)(3) of this part.

[52 FR 20507, June 1, 1987, as amended at 57 FR 43123, Sept. 17, 1992; 64 FR 34966, June 29, 1999]

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, § 655.100 was amended in paragraph (a)(1) by adding after “certification” in the first sentence, the phrase “and H-2A petition approval” and by adding at the end a new sentence; in paragraph (a)(4)(i) in the second sentence the phrase “20 calendar days” is removed and the phrase “30 calendar days” is added in lieu thereof, and in the last sentence the phrase “for certification” is removed; paragraph (a)(4)(iv) is amended by removing the phrase “for temporary alien agricultural labor certification”; paragraph (b) is amended in the final sentence of the definition of *Accept for consideration* by removing the phrase “in a temporary alien agricultural labor certification determination”; and in the definition of “Immigration and Naturalization Service (INS)”, by removing the phrase “which makes” and adding in lieu thereof the phrase “having the authority to

make”, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001. For the convenience of the user, the added text is set forth as follows:

§ 655.100 Overview of this subpart and definition of terms.

(a) * * * (1) * * * The term ‘application’ here used in this subpart shall mean an application for temporary alien labor certification and an H-2A petition unless otherwise stated.

* * * * *

§ 655.101 Temporary alien agricultural labor certification applications.

(a) *General*—(1) *Filing of application*. An employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may apply to the RA in whose region the area of intended employment is located, for a temporary alien agricultural labor certification for temporary foreign workers (H-2A workers). A signed application for temporary alien agricultural worker certification shall be filed by the employer, or by an agent of the employer, with the RA. At the same time, a duplicate application shall be submitted to the local office serving the area of intended employment.

(2) *Applications filed by agents*. If the temporary alien agricultural labor certification application is filed by an agent on behalf of an employer, the agent may sign the application if the application is accompanied by a signed statement from the employer which authorizes the agent to act on the employer’s behalf. The employer may authorize the agent to accept for interview workers being referred to the job and to make hiring commitments on behalf of the employer. The statement shall specify that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer’s behalf, and for compliance with all regulatory and other legal requirements.

(3) *Applications filed by associations*. If an association of agricultural producers which uses agricultural labor or

services files the application, the association shall identify whether it is: (i) The sole employer; (ii) a joint employer with its employer-member employers; or (iii) the agent of its employer-members. The association shall submit documentation sufficient to enable the RA to verify the employer or agency status of the association; and shall identify by name and address each member which will be an employer of H-2A workers.

(b) *Application form.* Each H-2A application shall be on a form or forms prescribed by ETA. The application shall state the total number of workers the employer anticipates employing in the agricultural labor or service activity during the covered period of employment. The application shall include:

(1) A copy of the job offer which will be used by each employer for the recruitment of U.S. and H-2A workers. The job offer shall state the number of workers needed by the employer, based upon the employer's anticipation of a shortage of U.S. workers needed to perform the agricultural labor or services, and the specific estimated date on which the workers are needed. The job offer shall comply with the requirements of §§ 655.102 and 653.501 of this chapter, and shall be signed by the employer or the employer's agent on behalf of the employer; and

(2) An agreement to abide by the assurances required by § 655.103 of this part.

(c) *Timeliness.* Applications for temporary alien agricultural labor certification are not required to be filed more than 45 calendar days before the first day of need. The employer shall be notified by the RA in writing within seven calendar days of filing the application if the application is not approved as acceptable for consideration. The RA's temporary alien agricultural labor certification determination on the approved application shall be made no later than 20 calendar days before the date of need if the employer has complied with the criteria for certification. To allow for the availability of U.S. workers to be tested, the following process applies:

(1) *Application filing date.* The entire H-2A application, including the job offer, shall be filed with the RA, in du-

plicate, no less than 45 calendar days before the first date on which the employer estimates that the workers are needed. Applications may be filed in person; may be mailed to the RA (Attention: H-2A Certifying Officer) by certified mail, return receipt requested; or delivered by guaranteed commercial delivery which will ensure delivery to the RA and provide the employer with a documented acknowledgment of receipt of the application by the RA. Any application received 45 calendar days before the date of need will have met the minimum timeliness of filing requirement as long as the application is eventually approved by the RA as being acceptable for processing.

(2) *Review of application; recruitment; certification determination period.* Section 655.104 of this part requires the RA to promptly review the application, and to notify the applicant in writing within seven calendar days of any deficiencies which render the application not acceptable for consideration and to afford an opportunity for resubmittal of an amended application. The employer shall have five calendar days in which to file an amended application. Section 655.106 of this part requires the RA to grant or deny the temporary alien agricultural labor certification application no later than 20 calendar days before the date on which the workers are needed, provided that the employer has complied with the criteria for certification, including recruitment of eligible individuals. Such recruitment, for the employer, the State agencies, and DOL to attempt to locate U.S. workers locally and through the circulation of intrastate and interstate agricultural clearance job orders acceptable under § 653.501 of this chapter and under this subpart, shall begin on the date that an acceptable application is filed, except that the local office shall begin to recruit workers locally beginning on the date it first receives the application. The time needed to obtain an application acceptable for consideration (including the job offer) after the five-calendar-day period allowed for an amended application will postpone day-for-day the certification determination beyond the 20 calendar days before the date of need, provided that the RA notifies the

applicant of any deficiencies within seven calendar days after receipt of the application. Delays in obtaining an application acceptable for consideration which are directly attributable to the RA will not postpone the certification determination beyond the 20 calendar days before the date of need. When an employer resubmits to the RA (with a copy to the local office) an application with modifications required by the RA, and the RA approves the modified application as meeting necessary adverse effect standards, the modified application will not be rejected solely because it now does not meet the 45-calendar-day filing requirement. If an application is approved as being acceptable for processing without need for any amendment within the seven-calendar-day review period after initial filing, recruitment of U.S. workers will be considered to have begun on the date the application was received by the RA; and the RA shall make the temporary alien agricultural labor certification determination required by § 655.106 of this part no later than 20 calendar days before the date of need provided that other regulatory conditions are met.

(3) *Early filing.* Employers are encouraged, but not required, to file their applications in advance of the 45-calendar-day minimum period specified in paragraph (c)(1) of this section, to afford more time for review and discussion of the applications and to consider amendments, should they be necessary. This is particularly true for employers submitting H-2A applications for the first time who may not be familiar with the Secretary's requirements for an acceptable application or U.S. worker recruitment. Such employers particularly are encouraged to consult with DOL and local office staff for guidance and assistance well in advance of the minimum 45-calendar-day filing period.

(4) *Local recruitment; preparation of clearance orders.* At the same time the employer files the H-2A application with the RA, a copy of the application shall be submitted to the local office which will use the job offer portion—of the application to prepare a local job order and begin to recruit U.S. workers in the area of intended employment.

The local office also shall begin preparing an agricultural clearance order, but such order will not be used to recruit workers in other geographical areas until the employer's H-2A application is accepted for consideration and the clearance order is approved by the RA and the local office is so notified by the RA.

(5) *First-time employers of H-2A workers.* With respect only to those applications filed on or before May 31, 1989, and notwithstanding the time requirements in paragraphs (c)(1) through (c)(4) of this section, under the following circumstances the RA shall make the certification determination required by § 655.106 of this part no later than 10 calendar days before the date of need:

(i) The employer would be a first-time employer of H-2A workers (and, prior to June 1, 1987, did not use or apply for certification to use H-2 agricultural workers under the INA as then in effect) and has not previously applied for a temporary alien agricultural labor certification to use H-2A workers;

(ii) The RA, the employer, and the ES System have had a reasonable opportunity to test the availability of U.S. workers under the conditions of a job offer which has been determined to be acceptable by the RA in accordance with the provisions of §§ 655.102 and 655.103 of this part at least 30 calendar days before the date of need; and

(iii) The RA has determined that the employer has otherwise made good faith efforts to comply with the requirements of this subpart.

(d) *Amendments to application to increase number of workers.* Applications may be amended at any time, prior to an RA certification determination, to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than ten workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved only when the need for additional workers could not have been foreseen, and that crops or commodities will be in jeopardy prior

to the expiration of an additional recruitment period.

(e) *Minor amendments to applications.* Minor technical amendments may be requested by the employer and made to the application and job offer prior to the certification determination if the RA determines they are justified and will have no significant effect upon the RA's ability to make the labor certification determination required by § 655.106 of this part. Amendments described at paragraph (d) of this section are not "minor technical amendments".

(f) *Untimely applications*—(1) *Notices of denial.* If an H-2A application, or any part thereof, does not satisfy the time requirements specified in paragraph (c) of this section, and if the exception in paragraph (d) of this section does not apply, the RA may then advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (c) of this section, there is not sufficient time to test the availability of U.S. workers. The notice of denial shall inform the employer of its right to an administrative review or *de novo* hearing before an administrative law judge.

(2) *Emergency situations.* Notwithstanding paragraph (f)(1) of this section, in emergency situations the RA may waive the time period specified in this section on behalf of employers who have not made use of temporary alien agricultural workers (H-2 or H-2A) for the prior year's agricultural season or for any employer which has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the RA has an opportunity to obtain sufficient labor market information on an expedited basis to make the labor certification determination required by § 216 of the INA (8 U.S.C. 1186). In making this determination, the RA will accept information offered by and may consult with representatives of the U.S. Department of Agriculture.

(g) *Length of job opportunity.* The employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA that the need for the worker is "of a temporary or seasonal nature", as defined at § 655.100(c)(2) of this part.

Job opportunities of 12 months or more are presumed to be permanent in nature. Therefore, the RA shall not grant a temporary alien agricultural labor certification where the job opportunity has been or would be filled by an H-2A worker for a cumulative period, including temporary alien agricultural labor certifications and extensions, of 12 months or more, except in extraordinary circumstances.

[52 FR 20507, June 1, 1987, as amended at 64 FR 34966, June 29, 1999]

EFFECTIVE DATE NOTE: At 65 FR 43543, July 13, 2000, § 655.101 was amended in paragraph (a)(1) by removing from the first sentence the final period and by adding in lieu thereof the phrase "and H-2A petition on Form ETA 9079, Application for Temporary Agricultural Labor Certification and H-2A Petition."; and by removing from the second sentence the phrase "for temporary alien agricultural worker certification"; by revising paragraph (a)(2) and the section heading; paragraph (b)(1) is amended by removing from the first sentence the phrase "A copy of the" and adding in lieu thereof the word "The"; paragraph (b)(2) is amended by removing the period at the end of the sentence and adding in lieu thereof the phrase "; and"; by adding new paragraphs (b)(3) and (h); in paragraph (c), introductory text, in the first sentence the phrase "for temporary alien agricultural labor certification is removed and in the third sentence the phrase "20 calendar days" is removed and the phrase "30 calendar days" is added in lieu thereof; in paragraph (c)(2) by removing the phrase "20 calendar days" in the four places it appears and the phrase "30 calendar days" is added in each place in lieu thereof, effective Nov. 13, 2000. The effective date was delayed until Oct. 1, 2001 at 65 FR 67628, Nov. 13, 2000. The effective date was further delayed until Sept. 27, 2002 at 66 FR 49275, Sept. 27, 2001. For the convenience of the user, the added and revised text is set forth as follows:

§ 655.101 Temporary alien agricultural labor certification applications and petitions.

(a) * * *

(2) *Applications filed by agents.* If an employer intends to be represented by an agent, the employer shall sign the statement set forth on the Form ETA 9079—*Application for Temporary Agricultural Labor Certification and H-2A Petition* that the agent is representing the employer and that the employer takes full responsibility for the accuracy of any representations made by the agent. The agent may accept for interview workers

being referred to the job and make hiring commitments on behalf of the employer.

* * * *

(b) * * *

(3) An H-2A petition.

* * * *

(h) Requests to change Consulates or ports of entry designated on approved petitions or to request a duplicate approval notice, shall be made by filing an ETA Form 9079M, *Visa Issuance Change Addendum*, with the Certifying Officer that approved ETA Form 9079, *Application for Temporary Agricultural Labor Certification and H-2A Petition*.

§ 655.102 Contents of job offers.

(a) *Preferential treatment of aliens prohibited.* The employer's job offer to U.S. workers shall offer the U.S. workers no less than the same benefits, wages, and working conditions which the employer is offering, intends to offer, or will provide to H-2A workers. Conversely, no job offer may impose on U.S. workers any restrictions or obligations which will not be imposed on the employer's H-2A workers. This does not relieve the employer from providing to H-2A workers at least the same level of minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(b) *Minimum benefits, wages, and working conditions.* Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, DOL has determined that in order to protect similarly employed U.S. workers from adverse effect with respect to benefits, wages, and working conditions, every job offer which must accompany an H-2A application always shall include each of the following minimum benefit, wage, and working condition provisions:

(1) *Housing.* The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, which may be, at the employer's option, rental or public accommodation type housing.

(i) *Standards for employer-provided housing.* Housing provided by the employer shall meet the full set of DOL Occupational Safety and Health Ad-

ministration standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404-654.417 of this chapter, whichever are applicable, except as provided for under paragraph (b)(1)(iii) of this section. Requests by employers, whose housing does not meet the applicable standards, for conditional access to the intrastate or interstate clearance system, shall be processed under the procedures set forth at § 654.403 of this chapter.

(ii) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock shall meet standards of the DOL Occupational Safety and Health Administration for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock shall meet guidelines issued by ETA.

(iii) *Standards for other habitation.* Rental, public accommodation, or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, Occupational Safety and Health Administration standards at 29 CFR 1910.142 shall apply. Any charges for rental housing shall be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer shall document to the satisfaction of the RA that the housing complies with the local, State, or federal housing standards applicable under this paragraph (b)(1)(iii).

(iv) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by an employer, and use of the public housing unit normally requires charges from migrant workers, such charges shall be paid by the employer directly to the appropriate individual or entity affiliated with the housing's management.

(v) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing shall not be levied upon workers by employers who provide housing for